

EXHIBIT Q

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**U.S. House of Representatives
Committee on Commerce**

**Room 2125, Rayburn House Office Building
Washington, DC 20515-6115**

February 24, 1998

The Honorable Carol M. Browner
Administrator
Environmental Protection Agency
401 M Street, S.W.
Washington, D.C. 20460

Dear Administrator Browner:

I am writing to express my concerns about the Environmental Protection Agency's handling of issues relating to "excess emissions" from diesel engines and to request certain information.

According to information supplied to the Committee by EPA, for nearly ten years, diesel engines have been manufactured in the United States which have incorporated new computer technologies that can affect engine performance. The EPA has indicated that these technologies have resulted in two calibration "maps" for diesel engines. One calibration map produces engine performance which meets the Federal Test Procedure (FTP) for nitrous oxide (NOx) emissions. Another calibration map, however, allows the engines to emit NOx at levels "much higher" than the certification levels contained in the FTP. EPA has asserted that this calibration map operates when engines are operated on highways, or in cruise conditions, and that such maps may become operational only seconds after the time periods used in the FTP. As noted in the February 11, 1998 edition of the New York Times, "The EPA, the Justice Department and various state pollution authorities are investigating whether the engines, which use computerized controls to manage fuel consumption and emissions, were illegally designed to skirt the Clean Air Act's controls on a leading source of smog, officials said."

Because diesel engines are used in a number of different highway vehicles as well as off-road and heavy construction equipment, "excess" NOx emissions from diesel engine vehicles are potentially significant. EPA has estimated that current excess emissions may total 500,000 tons of NOx per year and that, if uncorrected, such emissions could total 1.8 million tons of NOx per year by the year 2010. By comparison, EPA's final rule with respect to the control of emissions from heavy-duty diesel engines (October 27, 1997, 62 Fed Reg 54694) estimated that total nationwide

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NOx reductions resulting from the rulemaking would be 1.1 million tons per year by 2020. This level of reduction would represent approximately 9.5% of all projected mobile source NOx emissions nationwide.

In briefing material supplied to the Committee, EPA indicated that tests held in the Agency's Ann Arbor lab last Spring revealed the higher emissions. By this time, however, according to the same information supplied by EPA, diesel manufacturers had been producing engines incorporating new computer technology for as many as ten model years and hundreds of thousands of the higher-emitting engines were already on our nation's roads. I am troubled that it took the Agency this long to discover that higher emissions were associated with the new engine technology and I believe it is necessary to establish precisely when and how the Environmental Protection Agency learned that such technology could result in NOx emission levels above those measured by EPA's FTP.

In addition, I am very interested in EPA's *current* assessment of the amount of any "excess emissions." While the Committee appreciates the information that has been furnished so far by EPA, to date, the precise amount of any "excess emissions" and their effect on other Clean Air Act programs has not been established. It would therefore appear necessary, given the facts of this particular situation, for EPA to complete such an analysis before any final determination can be made as to enforcement issues and remedial actions.

More generally, it is evident that "excess emissions" of the level already estimated by the Agency may have a significant impact on the basic goals of the Clean Air Act, most notably the decades-long effort to bring nonattainment areas into compliance with National Ambient Air Quality Standards for ozone. Thus, further information on this matter is critical to the Committee's ability to oversee the implementation of the Clean Air Act and the 1990 Amendments to the Act. In order to give the Committee a better understanding of the environmental impact of these emissions and actions taken by the Environmental Protection Agency with respect to this matter, I request, pursuant to Rules X and XI of the Rules of the U.S. House of Representatives, that you provide answers to the following requests by March 6, 1998:

(1) Please explain when, and how, EPA first became aware that in-use diesel engines could be emitting NOx at levels "much higher" than those for which the engines had been certified. Please be precise in your response as to when the EPA became aware of this situation, and the source of any information that became available to EPA with regard to these "excess emissions."

(a) Please list and fully describe any contact, meetings, telephone conversations or communications or any type or kind that EPA (officials and employees) may have had with Congressional, federal, state, or local governmental persons or entities relating to the discovery of "excess emissions" from diesel engines. Please list the EPA personnel (officials and employees) who participated in such contacts,

meetings, telephone conversations or communications and describe all such contacts, meetings, telephone conversations or communications dating from the time that EPA first became aware that "excess emissions" were being emitted from in-use diesel engines until EPA completed tests at its Ann Arbor Facility last spring.

(b) Please list and fully describe any contact, meetings, telephone conversations or communications of any type or kind that EPA (officials and employees), may have had with any private persons or entities relating to the discovery of "excess emissions" from diesel engines. Please list the EPA personnel (officials and employees) who participated in such contacts, meetings, telephone conversations or communications and describe all such contacts, meetings, telephone conversations or communications dating from the time EPA first became aware that "excess emissions" were being emitted from in-use diesel engines until EPA completed tests at its Ann Arbor facility last spring.

(2) Please provide a detailed response as to why EPA apparently had no knowledge of the use and installation of calibration maps in diesel engines which resulted in "excess emissions" of NO_x for several years -- and possibly as long as eight or nine years -- after such maps were introduced into the manufacture of such engines.

(3) What actions were taken by EPA, and when were such actions taken, in response to the receipt, discovery or revelation of information concerning such "excess emissions?"

(4) What office within EPA is responsible for ensuring that certification tests are properly designed and implemented?

(5) Please provide all records relating to any budgetary request from any EPA office responsible for the certification of diesel engines which explicitly requests more resources to address the matter of "excess emissions" from diesel engines. Please also indicate the disposition of any requests and whether any additional funds were provided or denied.

(6) The EPA's final rule with respect to the Control of Emissions of Air Pollution from Highway Heavy-Duty Engines (October 21, 1997, 62 Fed Reg 54693) indicates on page 54707 that comments were received "that onboard computers can be used to change the engine operating conditions to optimize fuel economy at the expense of emissions in modes of operation."

(a) Please provide a copy of these comments as well as all records relating to the comments.

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(b) When were the comments received by EPA, who reviewed the comments, and what actions did EPA take in response to the comments?

(7) Please provide all records relating to when, how, from whom, and through what sources of information the EPA first became aware or informed of the possibility that there could be "excess emissions" from diesel engines.

(8) When did EPA begin any discussions, conversations or negotiations or any type or kind with affected manufacturers regarding the discovery or revelation of "excess emissions" from diesel engines?

(9) Through verbal briefings by EPA, it has been represented to the Committee that EPA and the Department of Justice are seeking to complete an agreement with respect to "excess emissions" in the near future, possibly as early as mid-March. Given that the Committee has also been informed that EPA does not have a precise assessment of the impact of "excess" diesel emissions on Clean Air Act programs, will EPA have completed an assessment of the impact of any "excess emissions" on Clean Air Act programs prior to reaching a settlement agreement? Will this assessment be used in determining the amount or level of remedial actions required by any settlement?

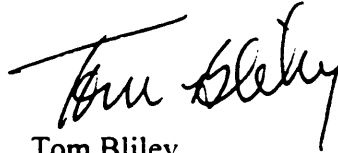
(10) Please provide the Committee with all records relating to any discussion, telephone conversation, meeting, negotiation or communication of any type or kind between EPA (officials and employees) and any federal or state governmental person or entity with respect to the existence or extent of any "excess emissions" from diesel engines. Please provide the Committee with all records relating to any discussion, telephone conversation, meeting, negotiation or communication of any type or kind between EPA (officials and employees) and any private person or entity with respect to the existence or extent of any "excess emissions" from diesel engines.

Thank you for your assistance with these requests. For purposes of all requests made in this letter, please refer to and incorporate the definitions of "records" and "relating to" contained as an attachment to this letter.

Altogether, I appreciate the two briefings which EPA has already provided to Committee staff and your willingness to provide a further briefing on February 26th. I would further request that you keep Committee staff informed of the progress of negotiations on this matter and any technical data or assessments that the Agency may produce with respect to the extent or effect of any "excess" diesel emissions. Please direct all correspondence, as well as any questions regarding these requests, to Mr. Robert Meyers, Commerce Committee Counsel (202-225-2927).

The Honorable Carol M. Browner
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Sincerely,

A handwritten signature in black ink, appearing to read "Tom Bliley". The signature is written in a cursive, flowing style with a long horizontal stroke at the beginning.

Tom Bliley
Chairman

Attachment

cc: The Honorable John D. Dingell
Ranking Member
House Commerce Committee

The Honorable Michael Bilirakis
Chairman, Health and Environment Subcommittee

The Honorable Sherrod Brown
Ranking member
Health and Environment Subcommittee

ATTACHMENT

For the purposes of this request, the word "records" shall include but shall not be limited to any and all originals and identical copies of any item whether written, typed, printed, recorded, transcribed, punched, taped, filmed, graphically portrayed, video or audio taped, however produced or reproduced, and includes but is not limited to any writing, reproduction, transcription, photograph, or video or audio recording, produced or stored in any fashion, including any and all computer entries, memoranda, diaries, telephone logs, telephone message slips, tapes, notes, talking points, letters, journal entries, reports, studies, drawings, calendars, manuals, press releases, opinions, documents, analyses, messages, summaries, bulletins, e-mail, disks, briefing materials and notes, cover sheets or routing cover sheets or any other machine readable material of any sort whether prepared by current or former employees, agents, consultants or by any non-employee without limitation. "Records" shall also include redacted and unredacted versions of the same record. For purposes of this request, the terms "relating" or "relate" as to any given subject means anything that constitutes, contains, embodies, identifies, deals with, or is in any manner whatsoever pertinent to that subject, including but not limited to records concerning the preparation of other records.



UNITED STATES ENVIRONMENTAL PROTECTION AGENCY
WASHINGTON, D.C. 20460

OFFICE OF
AIR AND RADIATION

Honorable Thomas J. Bliley
Chairman
Committee on Commerce
U.S. House of Representatives
Washington, D.C. 20515

Dear Mr. Chairman:

This is in response to your letter of February 24, 1998, to Administrator Carol Browner, concerning EPA's handling of issues relating to excess emissions from diesel engines, and requesting that EPA provide you with certain information. As you described in your letter, over the last decade the use of computer technology to control the performance of motor vehicles powered by diesel engines has expanded. Your letter also refers to briefings that EPA has provided your staff, describing EPA's investigation of the use of this technology by several manufacturers of diesel engines as a way to increase fuel economy. Your letter refers to information EPA has obtained from this investigation about the resulting increases in heavy-duty vehicle emissions, described as excess emissions. Finally, you express your concern about when and how EPA learned that such technology could result in excess emissions of oxides of nitrogen (NOx) above that measured on the Federal Test Procedure (FTP), and your interest in EPA's assessment of the amount of any such excess emissions and their impact on other Clean Air Act programs.

I can assure you that EPA considers the issue of such excess emissions to be a very serious matter. EPA and the Department of Justice (DOJ) have both devoted significant time and effort to investigate and pursue a resolution of this issue. EPA and DOJ are also working closely with California's Air Resources Board in its parallel investigation of this matter. In this process, we have been working intensively with the affected major manufacturers of heavy-duty diesel engines, and are hopeful that the matter can be resolved in the near future. As we have discussed with you, we are excluding sensitive enforcement information and confidential business information relating to the ongoing DOJ/EPA investigation from this response. For this reason, we are also limiting our chronology of events and contacts to the time before the matter was initiated by the Engine Compliance Group within the Office of Mobile Sources (OMS)

(May, 1997) and referred to the Air Enforcement Division within the Office of Enforcement and Compliance Assurance (OECA) (September, 1997).

In order to be fully responsive to your questions, it is important to provide some background information on the control of emissions from diesel engines and the statutory and regulatory scheme behind EPA's motor vehicle emission control program. The goal of EPA's motor vehicle program is to obtain real reductions of pollution during actual operation and use of the vehicles. This is the only way to realize the air quality benefits from the emissions standards. Compliance with emission standards is determined by comparing average emissions over the Federal Test Procedure to the standards. Compliance with the emissions standards over this cycle is critical to ensuring that real emissions reductions are obtained in-use. The FTP is representative of many kinds of in-use driving, but, like any test procedure, does not include all of the different and varied kinds of driving encountered in normal vehicle operation and use. In order to ensure the standards lead to real world emissions reductions, the use of devices to defeat the emissions system is prohibited. Defeat devices are methods of manipulating the emissions control system of a vehicle or engine that unlawfully reduce its effectiveness.

Emissions during operating conditions different from those used for the FTP are called off-cycle emissions. Understanding these off-cycle emissions from heavy-duty diesel engines has been an important concern of the Agency for several years, coinciding with the advent of more sophisticated emission controls on those engines over the last decade. While off-cycle emissions may in many cases legitimately be higher than the emissions standard, when high off-cycle emissions are caused by the use of a defeat device they are unlawful and stand as a barrier to achieving the full air quality benefits of EPA's emissions standards.

Defeat device is defined in EPA's regulations as an auxiliary emission control device (AECD) that reduces the effectiveness of the emissions control system under conditions which may reasonably be expected to be encountered in normal vehicle operation and use, unless:

- (1) such conditions are substantially included in the Federal emission test procedure;
- (2) the need for the AECD is justified in terms of protecting the vehicle against damage or accident;
- (3) the AECD does not go beyond the requirements of engine starting. 40 CFR 86.094-2

The existence, or possible existence, of defeat devices on current engines is a much different matter than legitimately higher off-cycle emissions, as described above.

Through the use of engine electronic controls, such as an element of design that detects modes of engine operation characteristic of the FTP, it would be possible to tailor the operation of the emission controls to perform properly when the Federal test was run, but essentially disable the emission controls in use. For example, the computer could sense driving patterns and cause engines to operate differently during in-use cruise conditions than they do on the FTP, even at the same engine speeds and loads. By way of example, the agency has found and taken enforcement actions in the past where manufacturers used a hood switch to control the action of an emission control system. The onset of computer controlled engines has created additional opportunities for sophisticated, difficult-to-detect software that can operate as a defeat device. Such was the case in our recent enforcement action involving General Motors.

In 1996, in pursuit of a fuller understanding of heavy-duty diesel in-use emissions, the Agency began a process of addressing the extent and degree of high off-cycle emissions and developing any regulatory changes that might be needed to insure adequate control of those emissions. Additional information on Agency actions addressing this issue is provided in the responses below. It was not until the Fall of 1997 that the possibility of widespread use of defeat devices became apparent. In May of that year EPA had undertaken the testing of an in-use diesel engine in our Ann Arbor lab. This testing, and our subsequent investigations, documented the existence of computer control strategies in many heavy-duty diesel engines which raised the question of possible widespread defeat device use. It is this topic that we have discussed with the Committee staff and which is the subject of your questions.

The following are specific responses to the questions raised in your letter.

(1) Please explain when, and how, EPA first became aware that in-use diesel engines could be emitting NOx at levels "much higher" than those for which the engines had been certified. Please be precise in your response as to when the EPA became aware of this situation, and the sources of any information that became available to EPA with regard to these "excess emissions."

(a) Please list and fully describe any contact, meetings, telephone conversations or communications of any type or kind that EPA (officials and employees) may have had with Congressional, federal, state, or local governmental persons or entities relating to the discovery of "excess emissions" from diesel engines. Please list the EPA personnel (officials and employees) who participated in such contacts, meetings, telephone conversations or communications and describe all such contacts, meetings, telephone conversations or communications dating from the time that EPA first became aware that "excess emissions" were being emitted from in-use diesel engines until EPA completed tests at its Ann Arbor Facility last spring.

(b) Please list and fully describe any contact, meetings, telephone conversations or communications of any type or kind that EPA (officials and employees), may have had with any private persons or entities relating to the discovery of "excess emissions" from diesel engines. Please list the EPA personnel (officials and employees) who participated in such contacts, meetings, telephone conversations or communications and describe all such contacts, meetings, telephone conversations or communications dating from the time EPA first became aware that "excess emissions" were being emitted from in-use diesel engines until EPA completed tests at its Ann Arbor facility last spring.

The compliance action which we are now engaged in had its origins in a Selective Enforcement Audit (SEA) of an engine manufacturer in 1995. An SEA involves emissions testing of production line engines. The engine family involved failed the audit. One outcome of that failure was a commitment by this manufacturer to work with EPA in conducting emission testing of in-use engines. At about the same time the Office of Enforcement and Compliance Assistance (OECA), based on what was learned in the General Motors matter and other information, had discussions with OMS concerning the investigation of defeat devices in heavy-duty engines and light-duty vehicles.

OMS began testing the company-provided engine shortly after it was provided in early 1997. Our testing of this engine employed the standard Federal Test Procedure and a variety of steady-state tests. That testing appeared to show the existence of questionable engine calibration strategies. With the reporting of those results on May 29, 1997, our compliance investigation and software review began.

Following this, in the Fall of 1997, EPA started to receive and review the engine manufacturers' applications for certificates of conformity for model year 1998 engines. This is an annual process, as a manufacturer of heavy-duty diesel engines must receive certificates of conformity for the new engines they produce each model year. Absent such certificates, they may not introduce the new engines into commerce. EPA sought information from the manufacturers regarding the use of computer controls and engine calibration strategies. It was in response to these inquiries that EPA first learned that there was widespread use by several engine manufacturers of questionable calibration strategies.

Following our identification of the widespread use of questionable emission control strategies, OECA became more directly involved in the matter. Our subsequent actions, including the involvement of the Department of Justice, are described further below in the response to question (3).

As described above, the communications on these matters with governmental

persons or entities and with private persons or entities occurred after, not before the completion of emissions testing at EPA's Ann Arbor facility last spring.

(2) Please provide a detailed response as to why EPA apparently had no knowledge of the use and installation of calibration maps in diesel engines which resulted in "excess emissions" of NOx for several years -- and possibly as long as eight or nine years -- after such maps were introduced into the manufacture of such engines.

Engines have always had calibration maps and, as we have stated above, EPA recognizes that there may be legitimate increased emissions over the average figure that represents the standard. Manufacturers of vehicles and engines have for years written proprietary software, that they consider to be among their most valuable trade secrets. However, the specific software at issue had not been described by manufacturers in their certificate application so that an evaluation could have been conducted as to whether they were defeat devices.

As described above, EPA did not learn about the excess emissions associated with the widespread use of suspect calibration strategies until EPA initiated an in-depth investigation in 1997. Over a several year period prior to that, EPA had received information about individual engines exhibiting emissions characteristics suggesting the possible use of off-cycle calibration strategies, including some test data on the engines. This information was not provided to EPA by the engine manufacturers in the annual certification process, but instead was submitted as comments by interested parties during various rulemaking proceedings, and in contacts with the Agency from individual parties. EPA's investigation of these matters did not, until 1997, find indications of the widespread use of these strategies. Prior to that time, EPA took appropriate action in the context of the rulemaking proceedings in which the matters arose, including publicly announcing in 1994 that the use of such calibration strategies would be considered the use of an unlawful defeat device.

The following description outlines, subject to the limitations described on the first page of this letter, the information provided to the agency and its actions in response over the last several years.

- (1) The earliest record we have of specific concerns being raised to the Agency about high in-use emissions from electronically controlled heavy-duty diesel engines was in the context of a complaint from a manufacturer in approximately early 1990. That company claimed that a competitor used a fuel injection strategy of retarded timing under transient operation and advanced timing under steady state operation. The company had some test data, but declined to identify the company or engine involved.

In 1991 EPA investigated the allegations brought by this company through a review of available certification and testing data. In that review, no engine could be identified that showed an unusual relationship between fuel economy and NOx.

- (2) Also in this time period, a staff person in our then Certification Division reported contacts from an outside party who claimed to have written engine control software for a manufacturer which detected the EPA test cycle and retarded engine timing for low emissions on the cycle. (According to a Note prepared on 5/20/97 by the employee.)
- (3) In 1993 a report which had been prepared by a contractor to our Ann Arbor lab was issued by the Organization for Economic Co-operation and Development on the "Control of Emissions From Heavy-Duty Vehicles." That report addressed the hypothetical ability of manufacturers to use "defeat strategies" that could be used to give low steady state emissions (and circumvent a steady-state test) while transient emissions - considered to be more representative of actual use - remained high. This same material had been issued as an EPA report in February 1990.
- (4) In June 1993, John Deere submitted comments on EPA's proposed Phase I standards for nonroad compression-ignition engines which described "transient sensing algorithms" used on two different highway engines to give low NOx emissions on the Federal test, but high emissions during steady-state operation. John Deere identified one Cummins engine and one DDC engine, and provided specific emissions and injection timing data for each.
- (5) In May of 1994, in the Preamble to its proposed Federal Implementation Plan for California, EPA referenced the John Deere comments and took the position that the use of transient sensing algorithms would be unlawful defeat devices and would not be an acceptable strategy.
- (6) An October 21, 1994 article in the "Mobile Source Report" published by Inside EPA reviewed the potential impacts of off-cycle emissions and the developing questions about the appropriate use of electronic controls to manage those emissions.
- (7) In August 1995, a manufacturer failed a Selective Enforcement Audit (SEA) for Particulate Matter. A Memorandum of Understanding was signed February 6, 1996 committing that manufacturer to cooperate in in-use emission testing over a two year period. In May of 1997, that manufacturer provided EPA with an engine for testing at our Ann Arbor laboratory as part of our in-use initiative. That testing documented substantial differences between steady-state and transient emissions

of NOx and started us toward the enforcement action which is now underway.

- (8) In the 1996 time frame, OMS was developing an in-use initiative to look more closely at in-use emissions from heavy-duty vehicles. During this time, OECA was formulating plans to improve enforcement of vehicle and engine emissions and in particular to look closely at in-use emissions from heavy-duty vehicles.

In mid-1996 the Office of Mobile Sources began a new initiative aimed at assessing the in-use performance of heavy-duty engines and developing any appropriate upgrades to the test procedure.

On July 8, 1996, after some discussions with EPA staff about the developing in-use initiative, Michael P. Walsh, an international consultant on mobile source issues, wrote a Memo to Margo Oge, the Director of EPA's Office of Mobile Sources, on the topic of heavy-duty vehicle emissions. That memo pointed out the need to improve the compliance program for heavy-duty diesels and consider upgrading the EPA test procedure for heavy-duty engines.

In March 1997 EPA, NESCAUM and the California ARB signed a Memorandum of Understanding to jointly work toward "an improved understanding of in-use emissions from heavy-duty diesel engines."

In September of 1997, a senior representative of the Office of Mobile Sources gave a public presentation on the in-use initiative at the annual North American Motor Vehicle Emissions Control Conference (NAMVECC 97).

As you can see from the above items, initial concerns about high in-use emissions date back to the early 1990's. These arose in response to the limited introduction of electronic engine controls for heavy-duty diesel engines in the late 1980's. Our initial investigations in the early 1990's failed to identify any potential noncompliance of the kind we are presently investigating, and given the limited use of electronics at the time, were not pursued further.

The 1993 comments from John Deere during the nonroad rulemaking identified specific engines and techniques which had the appearance of circumventing the on-highway FTP. In its 1994 response, the Agency concluded that the use of transient sensing algorithms could greatly increase an engine family's actual in-use NOx emissions over that predicted on the on-highway FTP, and decided that it would not be appropriate to allow the use of on-highway certification data to substitute for the steady-state non-road test procedure. Further, in proposing the Federal Implementation Plan for California, the Agency publicly stated that the use of transient sensing algorithms would

be considered a defeat device.

Following these actions, in 1995 and 1996 we began to take steps to more fully investigate the question of in-use emissions from heavy-duty engines. It was our 1996 in-use initiative which led to the identification of the "excess emissions" which are currently under investigation.

(3) What actions were taken by EPA, and when were such actions taken, in response to the receipt, discovery or revelation of information concerning such "excess emissions?"

As we have discussed with your staff, we are in the midst of a compliance investigation involving both our Office of Enforcement and Compliance Assurance and the Department of Justice. This was begun in direct response to our discovery of widespread use of emissions control strategies which involved the possible use of defeat devices. In the course of these events, we had a number of contacts with affected manufacturers of heavy-duty diesel engines, with the California Air Resources Board and with the Department of Justice. Furthermore, following initial discussions with manufacturers, in December 1997 OECA issued requests for information to engine manufacturers pursuant to Section 208 of the Clean Air Act. All affected persons have responded to these requests one or more times. We have also entered into settlement discussions with manufacturers. However, in order to protect the integrity of our current action, we will not be able to discuss these contacts in detail at this time. We would be glad to meet with you and explain these contacts more fully at an appropriate future time.

The questions at issue here are quite sensitive in nature and have substantial possible ramifications, both for the environment and for the companies involved. Aware of this, we have provided background briefings for appropriate Congressional committee staffs, including your own.

EPA also took actions in response to this discovery during the engine certification process for model year 1998. Because of the questions about the appropriateness of the strategies we had identified, the need for adequate time to fully investigate and resolve the questions, and the manufacturers' pending production deadlines (failure to receive EPA certification would have rapidly disrupted operations and shut down manufacturing plants), the Agency issued conditional certificates for affected engine families. EPA included the following two specific conditions in these certificates:

- (1) Any engine which employed a defeat device was not covered by the certificate.
- (2) Within 90 days following the issuance of the certificate the manufacturer was required to show cause, to the satisfaction of EPA, that the strategy for fuel injection

timing being used was not a defeat device.

In the course of our compliance investigation, the 90 day show cause deadlines have subsequently been extended as necessary to allow the ongoing discussions to continue.

(4) What office within EPA is responsible for ensuring that certification tests are properly designed and implemented?

EPA's Office of Mobile Sources is responsible for all certification activities for mobile sources (cars and light duty trucks, highway engines and non-road engines). Enforcement matters regarding certification reside with OECA.

(5) Please provide all records relating to any budgetary request from any EPA office responsible for the certification of diesel engines which explicitly requests more resources to address the matter of "excess emissions" from diesel engines. Please also indicate the disposition of any requests and whether any additional funds were provided or denied.

As noted above, the EPA office responsible for the certification of diesel engines is the Office of Mobile Sources (OMS) and OMS first identified the current "excess emissions" problem and began its compliance action in 1997. Because of the short time frame this represents in terms of budgetary cycles, no explicit budgetary requests were involved. Rather, OMS and OECA adjusted resources within their own programs to absorb the workload.

Please note that the numbers below reflect OMS personnel and contract resources and include some resources for compliance related testing of heavy-duty gasoline fueled engines that could not be readily separated from the diesel engine costs.

FY1997	5 FTE	\$230,000
FY1998	10 FTE	\$50,000

(6) The EPA's final rule with respect to the Control of Emissions of Air Pollution from Highway Heavy-Duty Engines (October 21, 1997, 62 Fed Reg 54693) indicates on page 54707 that comments were received "that onboard computers can be used to change the engine operating conditions to optimize fuel economy at the expense of emissions in modes of operation."

(a) Please provide a copy of these comments as well as all records relating to the comments.

(b) When were the comments received by EPA, who reviewed the comments, and what actions did EPA take in response to the comments?

Copies of all relevant comments and EPA's records relating to these that have been identified to date are also enclosed. Several commenters, representing States or local air pollution control agencies and environmental organizations, raised questions about the need to improve the in-use compliance program for heavy-duty engines. They argued that a more effective program would be needed if the benefits of the new standards were to be realized in use. In these comments, the focus was on, (1) whether in-use engines were meeting the applicable standards when measured on the FTP and, (2) the perceived need to modify or supplement the FTP to better control off-cycle emissions. The overall thrust of these comments was fully consistent with the direction of the in-use work EPA had begun in 1995.

In response to the second part of this question, all these comments were received in September 1996 during the public comment period on the rulemaking. They were reviewed and analyzed by appropriate personnel in the Office of Air and Radiation and the Office of General Counsel as part of the process of developing the Final Rule. In responding to these comments, EPA stated in the Preamble to its Final Rule that "improvements in the understanding of in-use emissions and the need to establish a viable in-use compliance presence are essential" and that EPA had "recently engaged in a number of activities to address in-use emissions" (62 FR 54707, October 21, 1997). The Preamble then went on to describe the Memorandum of Understanding with the California ARB and NESCAUM and the in-use initiative EPA was undertaking to deal with these issues. The Agency noted that "in addition, the in-use screening program will allow EPA to enforce certain provisions of section 203 of the Act, including the prohibition against manufacturer-designed strategies or devices that defeat the operation of the emissions control system,..."(62 FR 54707, October 21, 1997).

(7) Please provide all records relating to when, how, from whom, and through what sources of information the EPA first became aware or informed of the possibility that there could be "excess emissions" from diesel engines.

As described in our response to question one, the Agency first became aware of and identified the current problem concerning the possible use of defeat devices during its 1997 testing program and subsequent certification investigations. Further, as has been already described, we are still in the midst of an active compliance action regarding these "excess emissions."

To aid your review and understanding of this issue, we are including with this letter copies of the various documents identified in our response to your question 2 above

as well as various other documents. These documents, while not included in your request, illuminate events and EPA actions which preceded and eventually initiated the current compliance action.

(8) When did EPA begin any discussions, conversations or negotiations of any type or kind with affected manufacturers regarding the discovery or revelation of "excess emissions" from diesel engines?

EPA began discussions with the affected engine manufacturer shortly after the May 1997 tests described above. This was followed by discussions with other manufacturers in the Fall of 1997 as part of the 1998 certification cycle. The first conditional certificate was issued on October 20, 1997. Discussions with manufacturers involving OECA commenced early in December, 1997, with the first round of formal information gathering documents issued in mid-December. Formal settlement talks involving OECA and other agency offices, the Department of Justice and affected manufacturers began on January 15, 1998.

(9) Through verbal briefings by EPA, it has been represented to the Committee that EPA and the Department of Justice are seeking to complete an agreement with respect to "excess emissions" in the near future, possibly as early as mid-March. Given that the Committee has also been informed that EPA does not have a precise assessment of the impact of "excess" diesel emissions on Clean Air Act programs, will EPA have completed an assessment of the impact of any "excess emissions" on Clean Air Act programs prior to reaching a settlement agreement? Will this assessment be used in determining the amount of remedial actions required by any settlement?

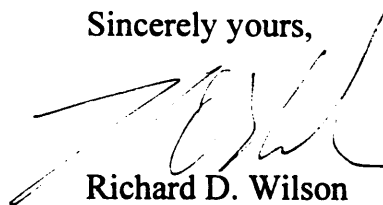
We have been developing and refining estimates of emission impacts from alleged use of defeat devices and expect that process to continue. One purpose of our requests for information from manufacturers was to elicit information to ensure that the agency, and ultimately the public, have estimates that are as accurate as possible. We are utilizing our current estimates to guide our considerations concerning a number of settlement issues, including the nature of remedial relief and, indeed, inherent in any estimate of future emissions, are assumptions concerning remedial settlement issues. Until settlement discussions are completed, more complete estimates cannot be calculated and release of our current estimate of emissions impacts could compromise our settlement discussions. However, it is our intent to provide our best estimate of the past and future emissions associated with any settlement to the public as part of the public review that such settlements are provided. At that time we will also be in a better position to set out for the Committee the specific impact, if any, of this matter on agency programs.

(10) Please provide the Committee with all records relating to any discussion, telephone conversation, meeting, negotiation or communication of any type or kind between EPA (officials and employees) and any federal or state governmental person or entity with respect to the existence or extent of any "excess emissions" from diesel engines. Please provide the Committee with all records relating to any discussion, telephone conversation, meeting, negotiation or communication of any type or kind between EPA (officials and employees) and any private person or entity with respect to the existence or extent of any "excess emissions" from diesel engines.

The Agency first became aware of and identified the current problem concerning the possible use of defeat devices during its 1997 testing program and subsequent certification investigations. Documents requested by this question concern activities conducted during and after this time and, as we noted before, are not being provided as part of this response.

In closing, we believe EPA has made a diligent, good faith effort to identify all Agency records that are responsive to your request. Accordingly, if at a later date we uncover additional records that are responsive, we will notify you immediately and provide a supplemental response. I appreciate the opportunity to be of service and trust that the enclosed information and documents will be helpful to you.

Sincerely yours,



Richard D. Wilson
Acting Assistant Administrator
for Air and Radiation

Attachments

cc: The Honorable John Dingell
Ranking Member
House Commerce Committee



UNITED STATES ENVIRONMENTAL PROTECTION AGENCY
WASHINGTON, D.C. 20460

OFFICE OF CONGRESSIONAL AND
INTERGOVERNMENTAL RELATIONS

March 23, 1998

NOTE TO:

Mark Paoletta
Bob Meyers
House Commerce Committee

FROM:

Dana Ott
Senior Counsel for Oversight

SUBJECT: Supplemental Materials -- EPA March 16 Response

I am enclosing documents to supplement our March 16 response to Chairman Bliley's letter of February 24, which had requested information concerning possible excess emissions from diesel engines. Specifically, I am sending the following:

- (1) excerpts from the Federal Register notice of 6/17/94 and EPA's response to comments document,
- (2) excerpts from the Federal Register notice of 5/17/93,
- (3) language inserted in the California FIP in February 1994.

I hope these documents will give you a more complete picture of EPA's response to the excess emissions issue. Please call me if you have further questions.

Enclosure



UNITED STATES ENVIRONMENTAL PROTECTION AGENCY
WASHINGTON, D.C. 20460

OFFICE OF CONGRESSIONAL AND
INTERGOVERNMENTAL RELATIONS

April 13, 1998

NOTE TO:

Bob Meyers
Counsel, Committee on Commerce

FROM:

Dana Ott 
Senior Counsel for Congressional Oversight

SUBJECT:

Supplemental Materials -- EPA March 16 Response

On March 19, we briefed you on the issue of diesel engines and possible excess emissions. At the time, you requested that we provide the "log book" of Cliff Tyree, which was referred to in some of the materials we had provided. Enclosed are the pages from Mr. Tyree's notes that include the referenced item. The names of companies and individuals and their phone numbers have been redacted.

Please call if you have questions.

Attachment



UNITED STATES ENVIRONMENTAL PROTECTION AGENCY
WASHINGTON, D.C. 20460

MAY 1 1998

OFFICE OF
GENERAL COUNSEL

Mr. Robert Meyers
Committee Counsel
Committee on Commerce
U.S. House of Representatives
Room 2125, Rayburn House Office Building
Washington, D.C. 20515-6115

Mr. Meyers,

This is a follow-up to our meeting on March 19, 1998 in which we discussed EPA's response to Chairman Bliley's letter of February 24, 1998. Chairman Bliley's letter concerned EPA's investigation of excess emissions of oxides of nitrogen from heavy-duty diesel engines. I am forwarding the attached document as a supplement to EPA's prior response. It contains the notes of an attorney in EPA's Office of Enforcement from his interviews in February 1998 with EPA personnel about various matters discussed in EPA's response to the second and seventh request in Chairman Bliley's letter.

The attorney was interviewing personnel as part of EPA's enforcement investigation and in preparation for possible litigation. The notes are therefore confidential, as well as protected by the work product doctrine and the attorney-client privilege. We request that you take appropriate measures to preserve their confidentiality, including refraining from providing them, or otherwise communicating their contents, to persons not directly involved in this Congressional oversight review.

Please feel free to contact me if you have any questions. I can be reached at (202) 260-7634.

Sincerely,

A handwritten signature in cursive script that reads "John Hannon".

John Hannon
Assistant General Counsel

enclosure

TOM BLILEY, VIRGINIA, CHAIRMAN

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JAMES E. DERDERIAN, CHIEF OF STAFF

U.S. House of Representatives
Committee on Commerce
Room 2125, Rayburn House Office Building
Washington, DC 20515-6115

October 20, 1998

The Honorable Carol M. Browner
Administrator
Environmental Protection Agency
401 M Street, S.W.
Washington, D.C. 20460

Dear Administrator Browner:

As you are well aware, the Commerce Committee has the responsibility to oversee the Environmental Protection Agency's ("EPA's") implementation of the Clean Air Act. To this end, since January of this year, I have been following your Agency's actions with respect to the discovery of "excess emissions" from diesel engines and related activity regarding a negotiated settlement. In this regard, I have attempted to work cooperatively with your Agency while respecting the sometimes sensitive nature of ongoing enforcement proceedings.

Given the level of "excess emissions" which the EPA attributes to diesel engines, however, there is a continuing need to ensure that your Agency's actions in this matter are both timely and in full conformance with the law. There is a need to review your Agency's past and present conduct and the effect of your Agency's actions with regard to several Clean Air Act programs which regulate both the direct emission and resulting atmospheric effects of nitrous oxides (NOx). There is also a need to assess the impact of your actions on state and local governments who must implement a variety of EPA regulations and guidance addressing the emission of NOx and who bear considerable costs in implementing control measures. Additionally, there is a need to analyze the effect of any "excess emissions" from diesel engines on ambient air quality in attainment and nonattainment areas, and any associated impact on human health and the environment.

Therefore, I am greatly disturbed by the refusal of your agency to provide a timely briefing on the current status of negotiations between the EPA and diesel engine manufacturers and the impact of these negotiations on Clean Air Act programs. This concern is exacerbated by the fact that EPA is currently engaged in the development and implementation of several major regulatory actions related to NOx emissions.

Letter to The Honorable Carol M. Browner
October 20, 1998
Page 2

From the initial briefing on this matter in January, I have been concerned about the possible impact of your Agency's activities on regulations affecting NOx emissions that had been proposed based on the work of the Ozone Transport Assessment Group. Now that a Final Rule for Reducing Regional Transport of Ground Level Ozone has been issued, my concerns about the possible impact of a settlement, or lack of settlement, are only heightened. The final NOx transport rule requires 22 States and the District of Columbia to design, approve and submit new State Implementation Plans (SIPs) within 12 months. Yet states and the District of Columbia have been required to begin this arduous process without precise information concerning a matter, which by your own estimation, could involve the emission of millions of tons of nitrous oxides within their borders.

In addition, the timeframe for state submittal of new SIPs for the 8 hour, .08ppm ozone standard has now been established as a matter of law. Under the provisions of Transportation Equity Act for the 21st Century ("TEA-21"), states must designate new nonattainment areas by July 1999 and your Agency must promulgate the designations no later than one year after the Governors submit their designations. EPA's Memorandum on the "Re-issue of the Early Planning Guidance for the Revised Ozone and Particulate Matter (PM) National Ambient Air Quality Standards" indicates that, in making such designations, "States should review 1996-1998 ozone air quality monitoring information, evaluate the data for completeness and conduct an assessment to determine which areas are violating the revised 8-hour ozone NAAQS." Therefore, it is clear that EPA currently intends Governors and the District of Columbia government to submit designations for the 8-hour standard on the basis of ambient air quality data which may be affected by "excess emissions" from diesel engines.

Third, the EPA is presently engaged in a number of separate actions involving the transition from the former 1 hour, 0.12 ppm ozone standard to the new 8 hour .08ppm standard. For example, on July 17, 1998, the EPA published a guidance memorandum concerning the "Extension of Attainment Dates for Downwind Transport Areas." This memorandum outlines a policy by which EPA seeks to address areas facing "bump up" to a higher classification under the one-hour standard where such areas are affected by upwind areas with later attainment dates, or significant contribution from an area in another state. Again, such policies are apparently being issued by EPA without accounting for the possible impact of "excess emissions" from diesel engines or how such emissions may affect the classification of any particular nonattainment area.

Finally, as part of my review of this situation, I have been concerned why it apparently took your Agency as many as ten model years to take any action with respect to what the Agency considers to be evidence of higher emissions associated with new engine technology. In your response to my letter of February 24, 1998, Mr. Richard D. Wilson, Acting Assistant Director for Air and Radiation indicated that he was "excluding sensitive enforcement information and confidential business information relating to the ongoing DOJ/EPA investigation." While I respect the sensitivity of the information and have no desire or intent to affect any investigation, it is also

Letter to The Honorable Carol M. Browner
October 20, 1998
Page 3

true that this limitation affects the ability of the Committee to assess, in a timely manner, the conduct of Agency personnel both before and after they received information indicating that NOx emissions from diesel engines could be substantially higher than the Agency previously estimated.

I would remind you that I have been fully respectful of the fact that possible criminal conduct is being evaluated. Previously, I have temporarily agreed, without prejudice, to the exclusion of certain information until such time as that information can be provided without jeopardizing a pending enforcement action. However, at the last briefing of committee staff on June 29, 1998, it was indicated that a consent decree in this matter was expected by mid-October. It was also indicated that this time period was important since the Agency had issued conditional certifications of engines for the previous model year and was expecting applications for certifications for the next model year during August and September. In fact, your Agency issued conditional certifications for the current model year engines beginning on October 20, 1997. Therefore, the status of current negotiations, the projected impact of these negotiations ongoing Clean Air Act programs, and precisely how the Agency is planning to address certifications for the next model year is a matter of great concern to me and well within the Commerce Committee's oversight responsibilities with respect to the implementation of the Clean Air Act.

In view of these considerations, I would respectfully renew my request a full briefing of committee staff concerning the current status of negotiations and their effect on Clean Air Act programs at the earliest possible time. I also would request that I be informed, in writing, by the close of business October 21, 1998, as to the earliest possible date and time that this briefing can occur.

In addition, since I have been unable to obtain any information from your Agency through means of a timely briefing of committee staff, I would request written answers to the following questions by October 28, 1998:

- (1) Will the EPA issue conditional certifications to any diesel engine for the upcoming 1999 model year? When will such certifications be issued and under what circumstances will the Agency issue such certifications? Please describe in detail the precise conditions that have been placed, or will be placed on any such certifications.
- (2) What is the legal authority, under the Clean Air Act, for the Agency to issue conditional certifications of diesel engines? Please provide specific statutory citations and associated interpretation of the Agency's legal authority with respect to conditional certifications for diesel engines which have and/or will be granted. Prior to October 20, 1997, did the Agency issue a conditional certification for any motor vehicle engine relying on section 206(a)(1) of the Clean Air Act or any other legal authority?

Letter to The Honorable Carol M. Browner
October 20, 1998
Page 4

Please also provide me with the following information by November 4, 1998:


(3) Please provide all records relating to EPA's consideration of, and determination to issue conditional certifications for diesel engines for the 1998 certification cycle. Please provide all records relating to EPA's consideration of, and determination of whether to issue conditional certifications for diesel engines for the 1999 certification cycle. Please also take action to preserve any and all records that may be created in the future relating to the issuance of conditional certifications for the 1999 certification cycle.

(4) Please provide all records relating to any estimate of the amount of air emissions, as well as the amount of any "excess emissions" from diesel engines that the Agency has produced, considered or developed in any manner, or which the Agency has contracted for, within the last two years.

(5) Please provide all records relating to Commerce Committee staff requests during the months of September and October, 1998, for a briefing regarding the current status of negotiations related to excess emissions from diesel engines.

For purposes of all requests made in this latter, please refer to and incorporate the definitions of "records" and "relating to" contained as an attachment to this latter. Thank you for your assistance with this request. Please direct any questions regarding these requests to Mr. Robert Meyers, Commerce Committee Counsel (202-225-2927).

Sincerely,


Tom Bliley
Chairman

TB/rjm
Attachment

ATTACHMENT

For the purposes of this request, the word "records" shall include but shall not be limited to any and all originals and identical copies of any item whether written, typed, printed, recorded, transcribed, punched, taped, filmed, graphically portrayed, video or audio taped, however produced or reproduced, and includes but is not limited to any writing, reproduction, transcription, photograph, or video or audio recording, produced or stored in any fashion, including any and all computer entries, memoranda, diaries, telephone logs, telephone message slips, tapes, notes, talking points, letters, journal entries, reports, studies, drawings, calendars, manuals, press releases, opinions, documents, analyses, messages, summaries, bulletins, e-mail, disks, briefing materials and notes, cover sheets or routing cover sheets or any other machine readable material of any sort whether prepared by current or former employees, agents, consultants or by any non-employee without limitation. "Records" shall also include redacted and unredacted versions of the same record. For purposes of this request, the terms "relating" or "relate" as to any given subject means anything that constitutes, contains, embodies, identifies, deals with, or is in any manner whatsoever pertinent to that subject, including but not limited to records concerning the preparation of other records.



UNITED STATES ENVIRONMENTAL PROTECTION AGENCY
WASHINGTON, D.C. 20460

OCT 29 1998

OFFICE OF
AIR AND RADIATION

Honorable Thomas J. Bliley
Chairman
Committee on Commerce
U.S. House of Representatives
Washington, D.C. 20515

Dear Mr. Chairman:

This is in partial response to your letter of October 20, 1998, to Administrator Carol Browner, concerning the Clean Air Act enforcement action against the manufacturers of heavy duty diesel engines for trucks, and requesting that EPA provide you with certain information.

As you know, on October 22, 1998, Attorney General Janet Reno and EPA Administrator Carol Browner announced that settlement had been reached in the heavy duty diesel enforcement action. Also on that day your staff was briefed on the terms of this settlement and its emissions impact, and your staff was given copies of the Consent Decrees that resolve these cases. The Consent Decrees were lodged with the United States District Court for the District of Columbia on October 22, 1998. The public comment period concerning the Consent Decrees is thirty days after notice of the Decrees is published in the Federal Register.

The following are specific responses to the questions for which you requested answers by October 28, 1998.

(1) Will EPA issue conditional certificates to any diesel engine for the upcoming 1999 model year? When will such certifications be issued and under what circumstances will the Agency issue such certifications? Please describe in detail the precise conditions that have been placed, or will be placed on any such certifications.

In the fall of 1997, EPA's review of manufacturers' certification applications for model year 1998 disclosed the widespread use by several engine manufacturers of questionable strategies for control of fuel injection timing. Because of questions about the appropriateness of the strategies identified by EPA, the need for adequate time to fully investigate and resolve the questions, and the manufacturers pending production deadlines, EPA issued conditional certificates for the affected engine families including the following two conditions:

- (1) Any engine which employed a defeat device was not covered by the certificate, and
- (2) Within a set time period following issuance of the certificate the manufacturer was required to show cause, to the satisfaction of EPA, that the strategy for fuel injection timing was not a defeat device.

Recently, EPA's investigation of these matters resulted in the lodging of consent decrees involving seven manufacturers of heavy-duty diesel engines. EPA does not intend to issue conditional certificates for model year 1999 engines with the same conditions as it did for 1998 model year engines. Instead, model year 1999 certificates will be issued for these manufacturers after their applications are fully reviewed (only a limited number of applications are currently pending before EPA), and after the entry of an appropriate court order ensuring compliance with the settlements.

(2) What is the legal authority, under the Clean Air Act, for the Agency to issue conditional certifications of diesel engines? Please provide specific statutory citations and associated interpretations of the Agency's legal authority with respect to conditional certifications for diesel engines which have and/or will be granted. Prior to October 20, 1997, did the Agency issue a conditional certification for any motor vehicle engine relying on section 206(a)(1) of the Clean Air Act or any other legal authority?

Section 206(a)(1) authorizes the Administrator to issue certificate of conformity "upon such terms ... as he may prescribe." EPA's regulation implement this authority in several ways. For example, EPA reserves the authority to issue certificates "upon such terms as [the agency] may deem necessary or appropriate to assure that any new motor vehicle (or new motor vehicle engine) covered by the certificate will meet the requirements of the Act and of [the applicable regulations.]" 40 CFR 86.094-30(a)(2). EPA has also set several conditions on certificates by regulation. For example, the regulations include the following condition on manufacturers of heavy-duty diesel engines who participate in the averaging, banking and trading program: all certificates are conditioned upon the manufacturer complying with the averaging, trading and banking provisions of the regulation, and failure to comply will be considered a failure to satisfy the condition upon which the certificate was issued and the certificate may be deemed void ab initio. In general, EPA has a long standing practice of including conditions on a certificate of conformity, where appropriate, including the condition that the certificates issued by the Agency apply only to those engines that conform in all material respects to the engines described in the certification application.

I appreciate the opportunity to be of service and trust that this information will be helpful to you. We are also working with your staff in scheduling a briefing in the very near future to discuss in more detail the environmental impacts of the settlements.

Sincerely yours,

A handwritten signature in black ink, appearing to read "Bob Perciasepe". The signature is fluid and cursive, with the first name "Bob" written in a more abbreviated, stylized manner.

Robert Perciasepe
Assistant Administrator

cc: The Honorable John Dingell
Ranking Member
House Commerce Committee



UNITED STATES ENVIRONMENTAL PROTECTION AGENCY
WASHINGTON, D.C. 20460

**OFFICE OF
ENFORCEMENT AND
COMPLIANCE ASSURANCE**

Honorable Thomas J. Bliley
Chairman
Committee on Commerce
U S House of Representatives
Washington, D C 20515

Dear Mr. Chairman:

This supplements our earlier partial response to your letter of October 20, 1998, to Administrator Carol Browner, concerning the Clean Air Act enforcement action against the manufacturers of heavy duty diesel engines. In that letter you requested that EPA provide you with certain information. An initial response to your request was sent on October 28, 1998, by Robert Perciasepe, Assistant Administrator for Air and Radiation. Administrator Browner has asked me to provide you with additional information in response to your request.

On November 3, 1998, your staff was briefed on various aspects of this enforcement action. The briefing also addressed the documents in EPA's possession and the question of which of these documents you need in order to conduct your review of this matter. In order to assist your staff in deciding which information would be useful to your work, it was agreed that EPA would provide copies of the requests for information that were issued by EPA to the engine manufacturers under authority of Clean Air Act section 208. Accordingly, copies of these requests to the manufacturers are enclosed.

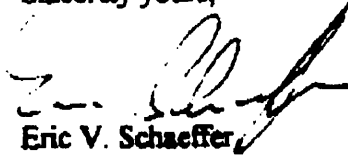
In addition, we are working with your staff to determine the most efficient manner to provide access to documents responsive to Questions 3 and 4 of your October 20, 1998, letter. This will also include documents related to the enforcement case that were withheld per our understanding that you requested in your February 24, 1998, letter.

In response to Question 5 of your October 20, 1998, letter, requesting all records relating to Commerce Committee staff requests during the months of September and October 1998 for a briefing regarding the current status of negotiations related to excess emissions from diesel engines, we have no records responsive to the requests.

Nov 5

I appreciate the opportunity to be of service and trust that the enclosed information will be helpful to you. If you have questions please call Bruce Buckheit, Director, Air Enforcement Division, at (202) 564-2260.

Sincerely yours,



Eric V. Schaeffer
Director
Office of Enforcement

enclosure

cc: The Honorable John Dingell
Ranking Member
House Commerce Committee

TOM BLILEY, VIRGINIA, CHAIRMAN

W.J. "BILLY" TALLER, LOUISIANA
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U.S. House of Representatives
Committee on Commerce
Room 2125, Rayburn House Office Building
Washington, DC 20515-6115

November 17, 1998

JAMES E. DECKERMAN, CHIEF OF STAFF

The Honorable Carol Browner
Administrator
Environmental Protection Agency
401 M Street
Washington, D.C. 20460

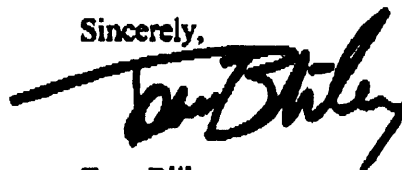
Dear Administrator Browner:

As you know, the Commerce Committee has been following your Agency's actions with respect to the discovery of "excess emissions" from diesel engines and related activity regarding a negotiated settlement. As part of this review, the Committee has made a number of requests for records relating to your Agency's discovery and review of information relating to excess emissions.

In this regard, Agency staff recently contacted the staff of the Committee regarding the scope of certain requests for records. This letter is to clarify that previous requests for records, made as part of written correspondence sent to your Agency on February 24, 1998, and October 20, 1998, include written responses and all other material sent to your Agency by diesel engine manufacturers in response to requests made by the Agency pursuant to section 208 of the Clean Air Act.

Thank you for your continued assistance with this matter.

Sincerely,



Tom Bliley
Chairman

TB/rjm



11/20/98

UNITED STATES ENVIRONMENTAL PROTECTION AGENCY
WASHINGTON, D.C. 20460

OFFICE OF
ENFORCEMENT AND
COMPLIANCE ASSURANCE

Honorable Thomas J. Bliley
Chairman
Committee on Commerce
U.S. House of Representatives
Washington, D.C. 20515

Dear Mr. Chairman:

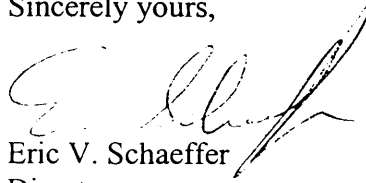
This supplements our earlier partial responses to your letter of October 20, 1998, to Administrator Carol Browner, concerning the Clean Air Act enforcement action against the manufacturers of heavy duty diesel engines. In that letter you requested that EPA provide you with certain information. Partial responses to your request were sent on October 28, and November 5, 1998.

After Mr. Joseph Stanko of your staff reviewed additional responsive documents at EPA's office on November 20, 1998, he requested that certain of these documents be supplied to the Committee as soon as possible. Accordingly, I have enclosed copies of these documents, except that the outgoing show cause letters from EPA to manufacturers and the show cause response from Detroit Diesel will be provided to you on November 23, 1998. We are continuing to assemble the remaining documents you requested and will provide them to you as soon as we are able.

The litigation with the manufacturers of heavy duty diesel engines is not yet fully resolved, and public release of the documents we are providing could compromise the conclusion of this litigation. In addition, many of the documents contain confidential business information.

I appreciate the opportunity to be of service and trust that the enclosed information will be helpful to you. If you have questions please call Bruce Buckheit, Director, Air Enforcement Division, at (202) 564-2260.

Sincerely yours,

A handwritten signature in black ink, appearing to read "E. Schaeffer", with a long, sweeping horizontal stroke extending to the right.

Eric V. Schaeffer
Director
Office of Regulatory Enforcement

Enclosure

cc: The Honorable John Dingell
Ranking Member
House Commerce Committee

**THE COMMITTEE ON COMMERCE
UNITED STATES HOUSE OF REPRESENTATIVES**



FAX TRANSMISSION

November 20, 1998

To: Jane Henriques
From: - Joseph Stanko, Counsel
Re: Diesel Documents

Number of Pages: 1
(Including This Sheet)

Notes: This is to confirm the substance of our conversation yesterday. EPA will:

- Retain all records responsive to the Committee's information requests in a manner that will allow prompt access by Committee staff upon notice from Committee staff;
- Provide as soon as possible to the Committee copies of the following types of records:
 - Outgoing show cause letters from EPA to manufacturers;
 - Narrative portions of show cause responses, plus non-data-type attachments;
 - Narrative portions of responses to question 1 of EPA's 208 information requests to manufacturers, if any, including non-data-type attachments;
 - All contents of three EPA staff files marked "Bruce Buckheit";
 - The "tagged" documents in three "piles" of EPA staff documents marked "Lawrence," "OECA," "OGC," and in one unmarked pile;
 - The tagged documents in seven folders of EPA staff documents marked "Fergeson" (2), "Hannon" (2), "Rich A.," "OMS," and "Emissions Data."
- Promptly produce (1) electronic mail messages from EPA "back-up" files; (2) additional Ann Arbor records; and (3) records reviewed by DOJ.

**If you receive this transmission in error,
please contact the Committee on Commerce.
2125 Rayburn House Office Building
Washington DC 20515
(202) 225-2927
FAX (202) 225-1919**



UNITED STATES ENVIRONMENTAL PROTECTION AGENCY
WASHINGTON, D.C. 20460

OFFICE OF
ENFORCEMENT AND
COMPLIANCE ASSURANCE

NOV 24 1998

Honorable Thomas J. Bliley
Chairman
Committee on Commerce
U.S. House of Representatives
2125 Rayburn House Office Building
Washington, D.C. 20515

Dear Mr. Chairman:

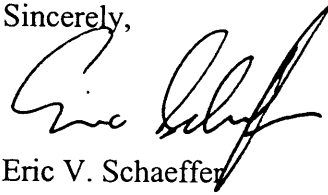
This supplements our earlier partial responses to your letter of October 20, 1998, concerning the Clean Air Act enforcement action against the manufacturers of heavy duty diesel engines, and in particular to the correspondence from Mr. Joseph Stanko of November 20, 1998, which identified specific information to be supplied to the Committee. We assembled the majority of the information requested and sent it to you on Friday, November 20, 1998, with an explanation that some information would be provided on November 23, 1998. However, due to a delay in obtaining certain information we were unable to meet that schedule.

Accordingly, enclosed herein please find the outgoing show cause letters from EPA to the engine manufacturers and the show cause narrative response including appropriate appendices from Detroit Diesel. I also have enclosed an example of a certification application for a heavy duty diesel engine, which is similar to many other certification applications on file at EPA which we can make available if it would be helpful. Additionally, copies of certain documents from a file labeled "OMS" that were marked with yellow tabs by Mr. Stanko were mistakenly not provided on November 20, 1998, and are enclosed. We believe the attached documents provide a complete response to the information we agreed to provide you by November 23. We will continue to assemble the remaining documents you requested and will provide them to you as soon as we are able.

Again, please note that the litigation with the manufacturers of heavy duty diesel engines is not yet fully resolved, and public release of the documents we are providing could compromise the conclusion of the litigation. In addition, many of the documents contain confidential business information.

Please feel free to contact Bruce Buckheit, Director, Air Enforcement Division, at (202)564-2260, should you have any questions.

Sincerely,

A handwritten signature in black ink, appearing to read "Eric Schaeffer", written over the printed name.

Eric V. Schaeffer
Director
Office of Regulatory Enforcement

enclosure

cc: The Honorable John Dingell
Ranking Member
House Commerce Committee



UNITED STATES ENVIRONMENTAL PROTECTION AGENCY
WASHINGTON, D.C. 20460

JAN 25 1999

Honorable Thomas J. Bliley
Chairman
Committee on Commerce
U.S. House of Representatives
2125 Rayburn House Office Building
Washington, D.C. 20515

Dear Mr. Chairman:

This supplements our earlier partial responses to your letter of October 20, 1998, concerning the Clean Air Act enforcement action against the manufacturers of heavy duty diesel engines, and in particular to the correspondence from Mr. Joseph Stanko of January 13, 1999, which identified specific items to be supplied to the Committee.

Accordingly, enclosed herein please find copies of the requested Show Cause Response narrative exhibits* and of the *EPA Advisory Circular 24-2, Prohibition on Emission Control Defeat Devices-Optional Objective Criteria*, dated December 6, 1998. The second EPA document requested, entitled *EPA Office of Mobile Sources Briefing to the Administrator on Use of Transient Emission Test Procedures for Heavy-Duty Engines*, dated January 6, 1982, is over seventeen (17) years old and we are unable to locate it at this time. A copy will be provided if it is found.

As you know, the litigation with the manufacturers of heavy duty diesel engines is not yet fully resolved, and the documents we are providing contain confidential business information the release of which could compromise the conclusion of the litigation. We would appreciate your cooperation in safeguarding these materials and keeping this information confidential.

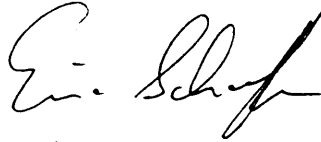
* Volvo's Show Cause Response Exhibit "N" was not in our files but, based upon the description provided in the Appendices, we acquired a duplicate of Exhibit "N" from the Department of Justice's records and have enclosed it herein.



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contains at least 50% recycled fiber

Please feel free to contact Bruce Buckheit, Director, Air Enforcement Division, at (202)564-2260, should you have any questions.

Sincerely,

A handwritten signature in black ink, appearing to read "Eric V. Schaeffer". The signature is fluid and cursive, with a prominent "E" and "S".

Eric V. Schaeffer
Director
Office of Regulatory Enforcement

enclosure

TOM BLILEY, VIRGINIA, CHAIRMAN

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JAMES E. DERDERIAN, CHIEF OF STAFF

U.S. House of Representatives
Committee on Commerce
Room 2125, Rayburn House Office Building
Washington, DC 20515-6115
February 2, 1999

The Honorable Carol M. Browner
Administrator
Environmental Protection Agency
401 M Street, S.W.
Washington, D.C. 20460

Dear Administrator Browner:

As you know, the Committee on Commerce has the responsibility to ensure that the Environmental Protection Agency (EPA) implements the Clean Air Act (CAA) in accordance with statutory language and Congress' intent. On October 22, 1998, EPA, the Department of Justice, and heavy-duty diesel engine manufacturers announced a proposed \$1 billion settlement regarding the use of electronic control systems in heavy-duty diesel engines.

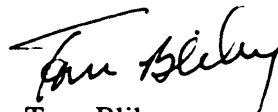
In order for the Committee to gain a better understanding of the settlement and the events and circumstances that led up to it, I have asked Committee staff to undertake a review of the history of EPA's heavy-duty diesel certification program. Accordingly, I plan to send certain Committee staff to EPA's Office of Mobile Sources in Ann Arbor, Michigan next week to review documents and interview EPA officials who were and are involved in the heavy-duty diesel certification program. My staff will be contacting your staff soon to work out the details. I expect the Agency's full cooperation with our review, and am requesting that you make available the necessary and appropriate personnel and documentation.

If you have any questions, please contact me or have your staff contact Mr. Tom DiLenge, Committee Counsel, or Mr. Robert Meyers, Committee Counsel, at (202) 225-2927.

The Honorable Carol M. Browner
Page 2

Thank you for your prompt attention to this matter.

Sincerely,

A handwritten signature in black ink, appearing to read "Tom Bliley". The signature is fluid and cursive, with a long horizontal stroke at the end.

Tom Bliley
Chairman

cc: The Honorable John D. Dingell, Ranking Member



UNITED STATES ENVIRONMENTAL PROTECTION AGENCY
WASHINGTON, D.C. 20460

FEB 24 1999

OFFICE OF
GENERAL COUNSEL

The Honorable Thomas J. Bliley
Chairman
Committee on Commerce
U.S. House of Representatives
Washington, D.C. 20515

Dear Mr. Chairman:

This is in response to your letter of February 2, 1999 requesting that the EPA make personnel in the Agency's Office of Mobile Sources in Ann Arbor available to your staff for interviews regarding the history of the EPA's heavy-duty diesel certification program.

As you know, the Department of Justice and the EPA are presently engaged in ongoing enforcement actions against seven manufacturers of diesel truck engines, in which the government has alleged that the engine manufacturers produced heavy-duty diesel engines that emitted excess air pollutants in violation of the Clean Air Act. On October 22, 1998, the Department of Justice and the EPA announced proposed settlement agreements with those manufacturers to resolve these claims. Those settlement agreements have been filed with the district court pending the United States' receipt and review of comments, but have not yet been submitted to or approved by the court. In the event that the United States declines, after consideration of public comment, to enter into these settlements, or in the event that the court refuses to approve these settlements, the United States would be required to pursue these enforcement actions at trial.

The personnel that your staff seeks to interview are potential witnesses in any such trial, and the matters about which your staff intends to inquire may be directly relevant to the claims or defenses litigated in such trials. Inadvertent or deliberate disclosure of information concerning these issues could damage the government's ability successfully to prosecute these enforcement actions. The Committee's interest in conducting this inquiry at this point therefore raises serious concerns regarding potential interference with ongoing enforcement actions of the United States. I enclose a letter which Lois Schiffer, Assistant Attorney General for Environment and Natural Resources, has written to Steve Herman, the EPA's Assistant Administrator for Enforcement and Compliance Assurance, describing the concerns that the Committee's request for interviews of the EPA's personnel has raised within the Department of Justice.



The Honorable Thomas J. Bliley
February 24, 1999
Page 2

In order to avoid any risk of such disruption, the EPA has requested that the Committee defer its inquiry into these matters until these enforcement actions are concluded. It is our expectation that the United States will determine whether to submit the proposed settlement agreements to the court in the immediate future, and in the event that the United States does so, we would hope that the court would decide whether to enter the consent decrees embodied within those settlements promptly. I regret that the Committee is not able to accommodate the EPA's request for a limited deferral of the present inquiry.

I have been assured, however, by the Committee's staff that the Committee will proceed in a manner that is sensitive to the enforcement interests of the United States, consistent with the Committee's responsibilities for effective oversight of this Agency's operations. In my discussions with your staff, we have identified certain measures to help minimize the risk that the Committee's inquiry may interfere with the pending enforcement actions. In particular, we have agreed that EPA personnel may have Agency counsel or personal counsel present during the interviews; that questioning will not relate to the conduct of settlement negotiations, confidential information obtained through settlement discussions, or the deliberations of the Agency and of the Department of Justice regarding the initiation of the present enforcement actions (such deliberations commenced in September 1997); and that the EPA's counsel may object if counsel believes a question does relate to such matters.

Finally, the Committee's staff have stated that any information obtained by the Committee from the EPA through these interviews, or through privileged documents provided by the Agency, will be maintained in a manner to ensure its confidentiality, and will be disclosed to third parties outside the government only in the course of the Committee's official duties and responsibilities, such as disclosure to other witnesses as necessary to conduct further investigation, official statements of the Committee or its Chair, or matters addressed during official hearings. I have requested that Committee staff consult with the EPA prior to any such disclosure so that the Agency may identify to the Committee particular concerns it may have regarding the impact of such disclosure upon the pending enforcement actions or any confidential business information that may be included in such disclosure. The Committee's staff has agreed to work with me and with the EPA's staff in this regard to ensure that the conduct of the Committee's oversight responsibilities in this matter does not unduly interfere with or place at risk the enforcement actions brought by the United States.

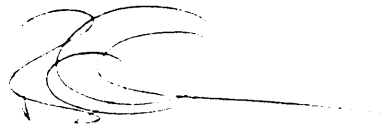
With respect to your request that the EPA make documents available to the Committee staff for their review during these interviews, the Agency believes that it has fully responded to your previous requests for documents concerning this program and these enforcement actions. Should additional documents be identified as responsive to those requests during the interviews, the EPA will promptly provide them to the Committee, with appropriate identification of any privileged or confidential business information that such documents may contain. Where immediate retrieval of such documents does not present undue administrative burden, EPA

The Honorable Thomas J. Bliley
February 24, 1999
Page 3

personnel may provide such documents to the Committee staff for their review during the course of the interviews, with hard copies provided to the Committee promptly after the Agency has reviewed the documents for privilege or confidential business information.

I appreciate the sensitivity that the Committee and its staff have shown to the government's interests in successful prosecution of the pending enforcement actions. The EPA continues to be concerned that the present oversight inquiry may place the enforcement interests of the United States at risk, but will work closely with your staff to minimize that potential while responding fully to the Committee's requests.

Sincerely,

A handwritten signature in black ink, appearing to be "RDreher", with a long horizontal line extending to the right.

Robert G. Dreher
Deputy General Counsel

cc: The Honorable John D. Dingell, Ranking Member
The Honorable Lois J. Schiffer, Assistant Attorney General
The Honorable Steven A. Herman, Assistant Administrator
The Honorable Robert Perciasepe, Assistant Administrator



U.S. Department of Justice

Environment and Natural Resources Division

Assistant Attorney General
950 Pennsylvania Avenue, N.W.
Washington, DC 20530-0001

Telephone (202) 514-2701
Facsimile (202) 514-0557

February 24, 1999

Steven A. Herman
Assistant Administrator
Office of Enforcement and
Compliance Assurance
U.S. Environmental Protection Agency
1200 Pennsylvania Avenue, N.W.
Washington, D.C. 20460

Dear Steve:

I understand that staff from the House Commerce Committee have expressed an interest in interviewing EPA employees who would likely be witnesses if we litigate the seven environmental enforcement actions currently pending against manufacturers of heavy duty diesel engines.^{1/} We appreciate the Committee's oversight interest in EPA policies regarding diesel truck emissions and enforcement of the Clean Air Act. But, we are concerned that if the EPA employee interviews occur before the settlements are finalized, our position if the action proceeds to trial would be complicated at best, and possibly compromised.

As you know, we filed enforcement actions against the seven diesel engine manufacturers for allegedly installing software-based devices which defeat the engines' emission control system during certain operations, including highway driving, and result in emissions of oxides of nitrogen that are two or three times the emissions shown on EPA's Federal Test Procedure. We entered into proposed settlements with the manufacturers and Consent Decrees have been filed with the U.S. District Court for the District of Columbia pending the United States' receipt and review of public comments, consistent with Department of Justice policy. See 28 CFR 50.7. On several occasions, our staffs have briefed the Committee on the proposed settlements and the impacts of the relief on other Clean Air Act programs.

My staff is in the process of reviewing and preparing responses to the comments, which we believe is important to the integrity of the settlements. Once this process is completed and assuming the United States continues to support the settlements, we will move the Court to

^{1/}United States v. Caterpillar, Inc., Civil Action No. 98-2544 (HHK); United States v. Mack Trucks, Inc., Civil Action No. 98-1495 (HHK); United States v. Navistar International Corp., Civil Action No. 98-2545 (HHK); United States v. Detroit Diesel Corporation, Civil Action No. 98-2548 (HHK); United States v. Volvo Truck, Corp. Civil Action No. 98-2547 (HHK); United States v. Cummins Engine Co. Civil Action No. 98-2546 (HHK); United States v. Renault, V.I., Civil Action No. 98-1495 (HHK).

enter the settlements. However, should either the United States withdraw its consent, or the Court decline to enter the settlements, the parties would then litigate the claims in our complaints.

Consequently, we are concerned about the prospect of the Committee interviewing potential witnesses about the enforcement actions, before the actions are concluded. The congressional staff interviews at this point pose a risk of misunderstandings, incomplete information and arguments about the waiver of privileges. For example, in our experience, statements from a single witness about the same events often contain minor variations, which opposing counsel seek to exploit in order to damage the witness's credibility. Other parties in the litigation could seek production of documents reflecting prior statements by these witnesses, such as Committee staff notes, or issue subpoenas to Committee staff in order to impeach EPA witnesses. We, of course, would not have copies of Committee staff notes and would argue that the notes are not discoverable for a variety of reasons, but it would be better if we did not have to litigate this question. If and when the settlements are finalized, we will no longer be faced with these risks.

Since I am sure the Committee does not want to interfere with the enforcement action, or subject itself to possible case discovery it would be better if the interviews could be postponed until after the litigation is concluded. At this point, I hope to receive my staff's recommendation within a few weeks and I will act promptly on that recommendation. Should we move for entry of the Consent Decrees, I would hope the Court would act on the motion promptly.

If the interviews go forward now, then EPA may want to reach agreement with the Committee about their scope and conduct in order to limit to the extent possible the risks to the litigation. For example, it would be important to confine the scope to matters occurring before the Department of Justice became involved in late 1997. Discussions of matters that occurred after that time could encompass settlement discussions, which are the subject of a confidentiality agreement with the manufacturers. This would minimize the risk of discussing confidential settlement matters, although it would not address the other concerns identified above. We understand that knowledgeable EPA counsel would attend any interviews that cannot await resolution of the litigation.

Again, we appreciate the Committee's interest in this matter and hope that the scheduling of these witness interviews can be resolved to protect the law enforcement actions without undue delay of the oversight inquiry. Please do not hesitate to contact me if we can provide additional assistance.

Sincerely,

Lois J. Schiffer/JSF

Lois J. Schiffer
Assistant Attorney General